Office Supreme Court, U.S.
FILED
APR 9 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961.

No. 848

PHILL SILVER, as a taxpayer of the City of Los Angeles and on behalf of all other taxpayers of the City of Los Angeles,

Plaintiff and Petitioner,

vs.

THE CITY OF LOS ANGELES, a municipal corporation, LOS ANGELES HARBOR OIL DEVELOPMENT COMPANY, *et al.*,

Defendants and Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

PHILL SILVER,
1680 North Vine Street,
Hollywood 28, California,
Petitioner in Pro. Per.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

Statement of matter involved 2

The findings of fact and conclusions of law 4

Jurisdiction 8

Questions presented 12

Reasons relied on for the allowance of the writ 13

The Supreme Court erroneously concluded that the petitioner lacked capacity to maintain this action as taxpayer in his representative capacity 13

The decision of the California Supreme Court based on non-federal grounds is untenable 14

A taxpayer can sue a municipality in cases involving a gross abuse of legislative discretion 14

The California Supreme Court acted under a mistake of law in concluding there was no basis for contending the city did not act fairly since plaintiff stipulated there was no actual fraud, corruption, bad faith, or undue influence.. 18

The Supreme Court erroneously concluded petitioner could not rely or contend that the city had acted unfairly by reason of the stipulation that there was no actual fraud.. 23

The Supreme Court acted under a mistake of law in differentiating between actual fraud and constructive fraud as a basis for denying petitioner capacity to sue 30

The Supreme Court acted under a mistake of law in concluding that petitioner lacks capacity to sue in the present action 31

Where competition is restrained, any municipal contract awarded under such conditions is invalid 32

PAGE

The acts of a municipality in its capacity as the trustee of an express trust are subject to judicial review for acts tantamount to a breach of trust 33

Opinions of the courts below 34

Summary of argument 34

Conclusion 34

Appendix A. Opinion of Supreme Court of California ..... App. p. 1

TABLE OF AUTHORITIES CITED

CASES	PAGE
Arbuckle's Estate, In re, 98 Cal. App. 2d 562	30
Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673	11
California v. Reynolds, 123 Cal. 88	33
Cardozo v. Bank of America, 116 Cal. App. 2d 833	22, 29
Carlson v. Curtis, 234 U. S. 103	11
Charters, Estate of, 46 Cal. 2d. 227	17
City of Long Beach v. Marshall, 11 Cal. 2d 609	13, 16
City of Long Beach v. Morse, 31 Cal. 2d 254	16
City of Los Angeles v. Superior Court, 51 Cal. 2d 423	14
City of Oakland v. Williams, 206 Cal. 315	14
City of Roseville v. Tulley, 55 Cal. App. 2d 601	14
Cochran v. Kansas, 316 U. S. 250	9
Coleman v. Miller, 307 U. S. 433	13
Crampton v. Zabriskie, 101 U. S. 601	13
Davis v. Santa Ana, 108 Cal. App. 2d 669	14
Ellis v. Commissioners, 38 Cal. 629	16
Ertle v. Leary, 114 Cal. 238	33
Evers v. Greenwood, 139 Cal. App. 2d 345	30
Fowler v. Rhode Island, 345 U. S. 67	8
Herd v. Touhy, 133 Cal. 55	30
Holland v. City of San Francisco, 7 Cal. 361	33
Hughes v. City of Torrance, 77 Cal. App. 2d 272	13
Illinois v. Board of Education, 333 U. S. 203	14
Iowa Des Moines Bank v. Bennett, 284 U. S. 239	9
Johnson v. Radio Station WOW, 13 N. W. 2d 556	29
Luther v. Compton Jr. College, 77 Cal. App. 2d 719	14

PAGE

Mallon v. City of Long Beach, 44 Cal. 2d 199 ..... 13, 16

Marin Water Co. v. Town of Sausalito, 168 Cal. 587 14

McKevitt v. City of Sacramento, 55 Cal. App. 117 ..... 16, 33

Missouri v. Canada, 305 U. S. 337 9

Missouri v. Gehner, 281 U. S. 315 11

Morgan v. Gove, 206 Cal. 607 33

Niemotko v. Maryland, 340 U. S. 268 8

Ohio v. Akron Park District, 281 U. S. 74 11

Pipes v. Hilderbrand, 110 Cal. App. 2d 645 14

Redevelopment v. Hayes, 122 Cal. App. 2d 777 14

Simley v. Holm, 285 U. S. 355 14

The Taxpayers League of Wayne County v. Wightman, 296 N. W. 886 29

Trickey v. City of Long Beach, 101 Cal. App. 2d 871 13

Virginia, Ex parte, 100 U. S. 339 9

VonHolt v. Izuno Mission of Hawaii, 42 Haw. 671 29

West, Ins. Co. v. Glenn, Irr. Dist., 50 Cal. App. 2d 204 18

STATUTES

California Civil Code, Sec. 1573 ..... 22, 29

California Constitution Art. I, Sec. 21 3

United States Code, Title 28, Sec. 1257 8

United States Constitution, Fourteenth Amendment 3, 8, 9, 12, 34

TEXTBOOKS

Bogert, Trusts and Trustees (2d Ed.), Sec. 541, pp. 447, 448, 457 33

2 Scott, Trusts (2d Ed.), Sec. 174, p. 1295 33

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. .....

PHILL SILVER, as a taxpayer of the City of Los Angeles and on behalf of all other taxpayers of the City of Los Angeles,

Plaintiff and Petitioner,

vs.

THE CITY OF LOS ANGELES, a municipal corporation, LOS ANGELES HARBOR OIL DEVELOPMENT COMPANY, *et al.*,

Defendants and Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Plaintiff and Respondent in the court below, Phill Silver suing as a taxpayer of the City of Los Angeles and on behalf of all other taxpayers of the City of Los Angeles, the Petitioner herein prays that a Writ of Certiorari be issued to review the final decree of the Supreme Court of the State of California reversing the judgment of the Superior Court of Los Angeles County and of the District Court of Appeal, 2nd Appellate District, respectively.

The Superior Court, after a trial on the merits, invalidated a tideland lease awarded by the City Council of the City of Los Angeles to the Defendant Los Angeles Harbor Oil Development Company, a private corporation.

The District Court of Appeal affirmed the judgment of the Superior Court. The Supreme Court of California reversed the judgment without remanding the case for a re-trial.

Statement of Matter Involved.

The case involves a suit by a taxpayer to have a tideland oil lease awarded by the City of Los Angeles to a private corporation declared null and void.

Petitioner's Second Amended Complaint consisted of 5 causes of action. The theory of the first cause of action was that the Council of the City of Los Angeles had committed a manifest abuse of discretion in approving a lease to the defendant, and appellant, Los Angeles Harbor Oil Development Company, without first giving either the Union Oil Company and its affiliated companies or General Petroleum Corporation a reasonable opportunity to negotiate with the Council for a lease, or to submit a lease bid. [Clk. Tr. Vol. I. pp. 123-131.]

In this cause of action the Petitioner alleged that the Charter of the City of Los Angeles was silent as to the leasing method to be followed in the leasing of the State granted tidelands; and that there was a duty enjoined upon the Council to exercise prudence and discretion in obtaining lease bids so far as reasonably practicable and that they failed to do so. [Clk. Tr. Vol. I. p. 130, pars. 20 and 22.]

The theory of the third cause of action was that the acts of the City Council in restricting lease proposals to one corporation had contravened the provisions of (Article 1), Sec. 21, of the California Constitution, as well as the equal protection clause of the Fourteenth Amendment of the United States Constitution. [Clk. Tr. Vol. I. pp. 133-134.]

In this cause of action it was alleged that prior to the making and issuance of the lease by the City of Los Angeles to the Los Angeles Harbor Oil Development Company, the Los Angeles City Council had failed and refused to grant other persons, firms or corporations a reasonable opportunity to submit an offer to the City of Los Angeles for the leasing of the City owned tidelands outside of the Los Angeles Harbor. It was alleged that the acts of the defendants had prevented competition in the leasing of said lands and had resulted in a lease being awarded to the defendant Los Angeles Harbor Oil Development Company on royalty and bonus terms far below the royalty and bonus terms the City of Los Angeles would have obtained, had other firms interested in leasing these tidelands been permitted to submit lease proposals. [Clk. Tr. p. 133, par. 2.]

The theory of the fourth cause of action was that by the acceptance of the grant of the tidelands from the State of California on the conditions imposed by the State of California, the City of Los Angeles had received title to said lands in Trust for the benefit of the people, that the right to itself drill for oil or to issue leases to others for this purpose was at all times subject to the same trust, that as such trustee, the City of Los Angeles assumed the same burdens and was subject to the same

regulations that pertain to other trustees of such trust, that there was a duty on the part of the City of Los Angeles to exercise reasonable care, prudence, and good business judgment in obtaining a qualified lessee on the most favorable terms available in the leasing of the rich oil resources entrusted to its care and supervision. That the City of Los Angeles in leasing said lands without giving the Union Oil Company a reasonable opportunity to submit their lease proposal in accordance with the extension of time which was granted to them by the Committee on Industry and Transportation, and in adopting a Resolution approving an oil lease to the defendant Los Angeles Harbor Oil Development Company without first giving other oil companies identified a reasonable opportunity to negotiate for a lease with the City of Los Angeles and to submit lease bids to the City of Los Angeles in accordance with the requests made, committed an abuse of the discretion vested within it as such a trustee. [Clk. Tr. Vol. I. pp. 134-136.]

With respect to each cause of action, the plaintiff contended that the lease was null and void.

The Findings of Fact and Conclusions of Law.

The Trial Court, among other findings of fact and conclusions of law, found as follows:

(1) That the City holds title to the submerged lands outside the breakwater of the City of Los Angeles in Trust and as trustee of a voluntary express trust;

(2) That as such trustee, the City of Los Angeles was bound to exercise the same prudence and was subject to the same duties, care and responsibility that apply to other trustees of other voluntary express trusts;

(3) That the City of Los Angeles was bound as a duty imposed by law to exercise in the management and leasing of the trust property, the same judgment and care under the circumstances which men of prudence, discretion, and intelligence exercise in the management of their own affairs, under a duty in all matters connected with the trust to act in the highest of good faith to and for the beneficiary;

(4) That the failure and omission on the part of the City as such trustee of an express trust to perform and comply with said duties specifically imposed and enjoined by law upon it constitutes a constructive fraud and vitiates the transaction, constituting an abuse of its powers as such trustee irrespective of whether the lease was or was not the best that it could procure;

(5) That the City did not in the management and leasing of the Trust Estate exercise the judgment and care under the circumstances which men of prudence, discretion and intelligence exercise in the management and leasing of their own property in the exercise of the highest good faith to and for its beneficiary and did not therefore perform a duty imposed and enjoined by law. That although requested by other highly experienced, capable, financially responsible and desirous lessees to negotiate with them, the trustee failed and omitted so to do and withheld from such applicants, though requested by them, information in the possession of the trustee as to the potentials of the trust lands desired to be leased. That although the trustee had expended substantial funds for a determination of the possible potential value of the Trust Estate and had received written opinions from experts retained by the

trustee hypothesizing the possibility of oil and gas existing in the trust property, the trustee knowing that the applicants had not the opportunity to make an investigation thereof, notwithstanding the said applicants request for information concerning the existence thereof in the possession of the trustee, and notwithstanding that the reports of the trustee's experts were public records, the trustee withheld from the applicants the information concerning the existence of such reports and incorrectly advised the applicants that it had no information with reference thereto.

That notwithstanding the fact that applications for leasing and requests for negotiations for leasing were made to the trustee through a Committee of the City Council by other companies involved in the exploration and development of properties for oil, gas and other hydrocarbon substances, and without a full and complete investigation, the trustee failed and omitted to negotiate with such applicants, disregarded the advice of the experts theretofore retained by the trustee, set no standards as advised by the experts to enable competitive bidding and without solicitation of any offers upon an equal footing from other experienced, capable and financially responsible applicants within the business field for which the trust property was deemed valuable, leased the trust property to a corporation without equipment, organization or capital, but whose organizers were otherwise financially capable though under no legally binding contract so to do to provide such capital.

The District Court of Appeal in affirming the judgment for the plaintiff herein rendered in the Superior Court reiterated that it was a thoroughly established

rule of law in the State of California that a taxpayer may sue in a representative capacity in cases involving the failure of a governmental body to perform a duty specifically enjoined. The District Court of Appeal then declared that after duly considering the findings of fact and conclusions of law reached by the Trial Court, that these findings by the Superior Court amply supported the Trial Court's determination that the City had failed to discharge its trust responsibility in that the defendant City of Los Angeles failed to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property, thereby violating duties enjoined on it by law in a transaction leading up to its execution of an oil and gas lease covering city owned lands.

The Supreme Court of California after granting a hearing to the defendant Development Company, reversed the judgment of the Superior Court and the affirmance of the District Court of Appeal, without remanding the case for a new trial. A Petition for a Rehearing was denied. The Supreme Court in reversing the respective decision based their conclusion upon two major points:

One: that the manner in which the defendant municipality effectuates the purpose of the tidelands trust hereinmentioned, including the manner in which it conducts negotiations for the leasing of the lands, is a municipal affair and that they are answerable to the electorate and not the courts.

Two: that the petitioner herein lacks capacity to maintain this suit.

This latter point was decided on an interpretation by the Supreme Court of a stipulation entered into by the

parties herein before the Trial Court. The Supreme Court concluded that the Plaintiff was precluded from contending that the Defendant City had violated any provisions of the prevailing law in California under which a taxpayer may maintain such a suit.

It is your Petitioner's contention raised in the Superior Court, and again raised on a Petition for a Rehearing before the Supreme Court after the unexpected and unanticipated reversal by the Supreme Court, that the decision of the Supreme Court has condoned a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution was committed by the City and City Council of the City of Los Angeles, respectively.

Jurisdiction.

(1) Jurisdiction of this Court is invoked under Title 28, United States Code, Sec. 1257, which provides in part:

> "Final judgments or decrees rendered by the highest court of the state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(3) By Writ of Certiorari, * * * where any title, right, privilege or immunity, especially set up or claimed under The Constitution, * * *."

(2) The following cases are believed to sustain the jurisdiction of this court:

Fowler v. Rhode Island, 345 U. S. 67;

Niemotko v. Maryland, 340 U. S. 268, 272-273;

Ex parte Virginia, 100 U. S. 339;

Cochran v. Kansas, 316 U. S. 250;

Iowa Des Moines Bank v. Bennett, 284 U. S. 239;

Missouri v. Canada, 305 U. S. 337;

(3) The Supreme Court of the State of California is the highest court of the State;

(4) The judgment of which review is sought is a final judgment of the Supreme Court of California;

(5) The judgment herein sought to be reviewed was filed on November 30, 1961, after decision by the District Court of Appeal affirming the judgment of the Superior Court in favor of the Petitioner herein. A Petition for a Rehearing duly filed was denied on January 9, 1962.

It is the contention of your Petitioner that a Federal question of substantial import has been raised herein, namely, whether in awarding the lease to the defendant development company herein, the City Council violated the equal protection clause of the Fourteenth Amendment of the United States Constitution. It is the further contention of your Petitioner that if the decision of the Supreme Court of California is allowed to stand, it would be contrary to the Fourteenth Amendment of the United States Constitution in that the lease was approved by the City Council in violation of the equal protection of the laws.

(6) The Federal question was timely raised and considered.

In the third cause of action of the Second Amended Complaint, Petitioner alleged as follows:

"The defendant City of Los Angeles, was created as a municipal corporation to act for the protection and welfare of its taxpayers. No authority was vested in said corporation either by charter or by general law to permit the municipality to confer monopolies or special pecuniary benefits to individual members of the municipality not available to other members thereof. Any and all laws or privileges confered by such municipality pursuant to leases granted by ordinance or other legislative act must be a privilege open to the enjoyment of all upon the same terms and conditions. This obligation upon the part of a municipality is likewise imposed by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States as well as the Constitution of the State of California. Section 21 (Article 1) of the Constitution of the State of California provides that no citizen shall be granted privileges or immunities which upon the same terms shall not be granted to all citizens.

"The acts of the Los Angeles City Council in restricting lease proposals to one corporation, as hereinabove described, contravenes the provisions of Section 21 (Article 1) of the Constitution of the State of California, as well as the equal protection clause of the Fourteenth Amendment, and the said lease so awarded to the Los Angeles Harbor Oil Development Company is null and void and has conferred no benefits or privileges in said corporation which can be asserted against the City of Los Angeles." [Clk. Tr. Vol. I, p. 134.]

The Superior Court ruled adversely on the Federal question against the Petitioner, as follows:

In Supplemental Findings of Fact, the Court found:

> "No acts or omissions on the part of the defendant, the City of Los Angeles, contravened or violated any rights of Plaintiff under either the Fourteenth Amendment of the Constitution of the United States or the Consitution of the State of California, including Section 21 thereof." [Supp. Clk. Tr. p. 23.]

The Federal question was again arised in the Petition for a Rehearing as follows:

> "In awarding the lease to the Appellant, the Council violated the equal protection clause of the Fourteenth Amendment of the United States Constitution". (Petition for a Rehearing, p. 28.)

The raising of the Federal question in a Petition for Rehearing is timely if it appears that the question was first brought into the case by an unexpected decision of the highest State Court, and that the litigant had no prior opportunity to assert the claim to Federal right or immunity.

Ohio v. Akron Park District, 281 U. S. 74;

Missouri v. Gehner, 281 U. S. 313, 320;

Brinkerhoff Faris Co. v. Hill, 281 U. S. 673, 677;

Carlson v. Curtis, 234 U. S. 103.

Questions Presented.

Did the City of Los Angeles, in awarding a tidelands lease, violate the equal protection clause of the 14th Amendment of the United States Constitution. The further question presented is whether the decision of the Supreme Court of California, if allowed to stand, would be contrary to the 14th Amendment of the United States Constitution in that the lease was approved by the City Council in violation of the equal protection of the laws.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Supreme Court Erroneously Concluded That the Petitioner Lacked Capacity to Maintain This Action as Taxpayer in His Representative Capacity.

It is your Petitioner's contention that the Supreme Court acted under a mistake of law in concluding that the Petitioner did not have capacity to bring such a class action as a taxpayer on his own behalf and on behalf of all other taxpayers the municipal beneficiaries of the trust created in the State-granted tidelands. The California Courts have consistently recognized the right of a taxpayer, in his representative capacity to bring suit to prevent the improper use of the State-granted tidelands or the waste of funds acquired by the municipalities as revenue therefrom.

Trickey v. City of Long Beach, 101 Cal. App. 2d 871;

Mallon v. City of Long Beach, 44 Cal. 2d 199;

Morse v. City of Long Beach, 31 Cal. 2d 254.

cf. Hughes v. City of Torrance, 77 Cal. App. 2d 272.

This Court has similarly recognized the right of a taxpayer to bring suit to question municipal action involving a waste or a potential waste of public funds:

Coleman v. Miller, 307 U. S. 433, 445;

Crampton v. Zabriskie, 101 U. S. 601.

But also in his representative capacity as a class action on behalf of all other taxpayers:

Simley v. Holm, 285 U. S. 355;

Illinois v. Board of Education, 333 U. S. 203.

The Decision of the California Supreme Court Based on Non-Federal Grounds Is Untenable.

The Supreme Court acted under a mistake of law in determining on that a taxpayer in his representative capacity can sue a municipality only in cases involving fraud, collusion, ultra vires, or a failure on the part of a governmental body to perform a duty specifically enjoined.

A Taxpayer Can Sue a Municipality in Cases Involving a Gross Abuse of Legislative Discretion.

The California courts have always recognized that an action by a taxpayer against a municipality will lie where the municipal body has committed a gross or a manifest abuse of discretion. *City of Los Angeles v. Superior Court*, 51 Cal. 2d 423, 432; *Redevelopment v. Hayes*, 122 Cal. App. 2d 777, 812 "(bad faith, fraud, arbitrary action or *abuse of discretion*);" *Luther v. Compton Jr. College*, 77 Cal. App. 2d 719, 726 "(fraudulent or so palbably unreasonably and arbitrary as to indicate *abuse of discretion* as a matter of law);" *City of Roseville v. Tulley*, 55 Cal. App. 2d 601, 608, 609; *Davis v. Santa Ana*, 108 Cal. App. 2d 669; *Pipes v. Hilderbrand*, 110 Cal. App. 2d 645, 649; *City of Oakland v. Williams*, 206 Cal. 315, 327; *Marin Water Co. v. Town of Sausalito*, 168 Cal. 587, 598.

In the First Cause of Action of the Second Amended Complaint plaintiff alleged,

> "In approving the committee report of December 18, 1956, without giving the Union Oil Company of California a reasonable opportunity to submit their lease proposal, in accordance with the extension of time which was granted to them by the committee on industry and transportation, and in adopting the Resolution of December 27, 1956, approving an oil lease to the Los Angeles Harbor Oil Development Company, without first giving either the Union Oil Company or General Petroleum Company a reasonable opportunity to negotiate for a lease with the council, or to submit lease bids to the council in accordance with their request, the members of the council as public officers committed *a manifest abuse of the legislative discretion vested in them*, and the lease so awarded by them to the Los Angeles Harbor Oil Development Company is void." [Clk. Tr. Vol. 1, p. 131.]

The Fourth Cause of Action of plaintiff's Second Amended Complaint alleges that the city became a trustee of an express trust by the acceptance of the grant of the tidelands from the State of California on the conditions imposed by the state. That as such a trustee, the City of Los Angeles assumed the same burdens and was subject to the same regulations that appertain to other trustees of such trusts. That the City in approving an oil lease without first giving either Union Oil Company, Continental Oil Company, Shell Oil Company, Superior Oil Company and General Petroleum Corporation a reasonable opportunity to negotiate for a lease with the City of Los Angeles, and to submit

lease bids to the City of Los Angeles in accordance with the requests made committed an *"abuse of the discretion vested within it as such a trustee."*

The California courts have consistently held that the municipal grantees of the state granted tidelands become a trustee and are subject to the same regulations that appertain to other trustees of such trusts.

In *City of Long Beach v. Morse*, 31 Cal. 2d 254, the Supreme Court said,

> "The City is the trustee and as such assumes the same burdens and is subject to the same regulations that appertain to other trustees of such trusts."

To the same effect is the *City of Long Beach v. Marshall*, 11 Cal. 2d 609, and *Mallon v. City of Long Beach*, 44 Cal. 2d 199.

In *Ellis v. Commissioners*, 38 Cal. 629, the California Supreme Court there said,

> "The commissioners are the exclusive judges of the necessity for such sale or lease until the trust is finally closed, and their action in this respect cannot be impunged, nor its discretion controlled by the City or its grantee, except on the ground of fraud or a *gross abuse of discretion by the trustee.*"

In *McKevitt v. City of Sacramento*, 55 Cal. App. 117, 126, the court there held that it does have the power to review and set aside any act in the execution of the trust constituting an *abuse* by a public body of its powers as a public trustee.

The Trial court found that the land had been granted to the City of Los Angeles by the State of California to be held in Trust. [Clk. Tr. Vol. III, p. 608.]

The trial court found paragrpah XXIII of plaintiff's First Cause of Action to be true. [This paragraph alleged among other things,

> "As stated above, that the members of the council as public officers have committed a *manifest abuse of the legislative discretion vested in them,* and the lease so approved by them to the Los Angeles Harbor Oil Development Company was void." [Clk. Tr. Vol. I, p. 131.]

The Trial Court found paragraph VI of the Fourth Cause of Action to be true. "As stated above and alleged that the City had committed an *abuse of the discretion vested in it as such a Trustee.*". [Clk. Tr. Vol. I, p. 136.]

In its conclusions of law, the Trial Court held that the City had acquired the lands in Trust and as trustees of a voluntary express trust; that as such trustee it assumed and was bound to exercise the same prudence and was subject to the same duties, care and responsibility that apply to other trustees of other voluntary express trusts; that the City did not in the management and leasing of the Trust Estate exercise the judgment and care under the circumstances which men of prudence, discretion and intelligence exercise in the management and leasing of their own property, and the City did not therefore perform a duty imposed and enjoined the law. [Clk. Tr. p. 644 to 646, line 1.]

That a court may review the action of a Trustee for fraud, bad faith *or abuse of discretion* is also indicated by the case of the *Estate of Charters*, 46 Cal. 2d 227.

The California Supreme Court Acted Under a Mistake of Law in Concluding There Was No Basis for Contending the City Did Not Act Fairly Since Plaintiff Stipulated There Was No Actual Fraud, Corruption, Bad Faith, or Undue Influence.

The California Supreme Court in its decision said.

> "All that was required of defendant municipality was that its agents act fairly in all matters respecting the proper discharge of their duties," the court citing *West. Ins. Co. v. Glenn. Irr. Dist.*, 50 Cal. App. 2d 204, 209.

The Supreme Court added.

> "Since it was stipulated that there was no actual fraud, corruption, bad faith or undue influence, there is no basis for contending that they did not act fairly." (57 A. C. at p. 16.)

Actually, plaintiff did *not* stipulate that there was no actual fraud, corruption, bad faith or undue influence. The stipulation was as follows:

> "The plaintiff in this case has not ***alleged*** or *charged*, nor does he intend to charge, any of the defendants in this case with fraud, undue influence, or corruption; that the plaintiff has alleged and is relying upon the theory that the defendant councilmen in their capacity, first, as the members of the city council, and independently of the City Council, that a portion of the council as a committee of industry and transportation, did not pursue, first, the provisions of section 34 of the Charter, and, additionally, did not pursue the provisions of the general law which are applicable to the lease in this case; and consequently and as a result of these

acts, I have alleged and charged that these acts constituted not only * * * a violation of a duty enjoined by law, which is tantamount to an *abuse of legislative discretion*, that insofar as an abuse of discretion is sometimes considered implied fraud or constructive fraud, that if that is the definition of an abuse of discretion then it is my contention that that particular type of fraud would be applicable in this particular case in determining whether or not the facts prove an abuse of the legislative discretion.

"It is my theory and contention, however, * * * in this case, that if the plaintiff proves a violation of the provisions of section 34 of the Charter, that that will, as a matter of law, without the requirement on the part of the court to find that that constitutes an abuse of discretion, automatically be an abuse of discretion sufficient to justify judgment in this case."

"The Court: Just so that the record is clear, insofar as your statement that you do not intend to charge fraud, you are apparently referring to and only referring to actual fraud as distinguished from either constructive or implied fraud?

Mr. Silver: That's right.

Mr. Halverson: * * *. It is my understanding that plaintiff offers to stipulate that in his complaint and in his case, in the evidence to be introduced in the case, that he is not charging fraud, corruption, bad faith, or undue influence, with the exception that he is maintaining that there may be fraud insofar as the claimed failure of the city to perform the requirements of section

34 of the City Charter, or the requirements of the general law. Is that correct?

Mr. Silver: That is correct.

Mr. Halverson: I will accept that stipulation as amended, your Honor.

Mr. Silver: Correction or the requirement of the municipal law or of the federal and state Constitutions, which grant certain privileges and immunities to every citizen on an equal basis; subject also to the correction of bad faith. In other words, I think that the same situation of the fraud implied by a violation of a duty enjoined by law is bad faith and would come under the same interpretation. In other words, a violation of a Charter or a violation of the duty enjoined by general law or constitutional law would automatically constitute bad faith without any particular overt evidence of statements of ill will or malice. So Mr. Halverson, if you will accept my corrections, then we have an accord.

Mr. Halverson: I will accept the correction insofar as it pertains to the Constitution of the United States and the Constitution of the State of California.

The Court: Mr. Halverson, today you did inject the words 'bad faith' as distinguished from the proposed stipulation yesterday; at least, as I noted it yesterday. I suggest that we could have a stipulation that Mr. Silver is not charging actual fraud as distinguished from either implied or constructive fraud, nor undue influence nor corruption.

Mr. Silver: That is it. If we stay right there, right, we are in accord. [illegible] saving the trouble.

Mr. Halverson: I will accept the stipulation as amended by your Honor.

Mr. Young: I will accept the stipulation.

The Court: Is that acceptable to you, Mr. Silver?

Mr. Silver: Yes." [Rep. Tr. p. 5, line 18, to p. 9, line 19; Petition for Rehearing, pp. 3-7, inclusive.]

It is the contention of the petitioner herein that he did not stipulate that there was no actual fraud, corruption, bad faith, or undue influence. The stipulation was to the effect that the plaintiff was,

"not *claiming* * * * any actual fraud or undue influence or corruption on the part of the defendants."

Petition additionally in the stipulated stated to the court he had,

"not *alleged* or *charged* nor does he intend to charge, any of the defendants in this case with actual fraud, undue influence, or corruption."

This did not constitute a waiver that the public officials in question, or any of them, had acted fairly in the discharge of their duties. The so-called disclaimer of actual fraud or actual bad faith or corruption or undue influence did not constitute a waiver of abuse of discretion or constructive fraud. Thus, if the public officials had been guilty of an abuse of discretion or constructive fraud or a violation of a duty enjoined by law or the equal protection of the law, it cannot be argued that the municipality had acted fairly.

In *Cardozo v. Bank of America*, 116 Cal. App. 2d 833, the court defined constructive fraud as follows.

> "Constructive fraud consists;
>
> (1) In any breach of duty which, without an actually fraudulent intent, means an advantageous to the person at fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him." (Civ. Code, Sec. 1573.)

The case was tried in the Superior Court on the basis that constructive fraud was an issue in the case to be determined by the trial court. In the findings of fact, the Trial Court said,

> "That plaintiff, upon the trial hereof, did expressly disclaim any actual fraud, as *distinguished from constructive fraud*, * * * faith—that is, malevolence toward a party on the part of the City of Los Angeles in the execution of the lease." [Finding 82, Clk. Tr. p. 643, lines 12-16; Petition for Rehearing, pp. 10-11.]

In the conclusions of law the trial court said,

> "That the failure and omission on the part of said City as said trustee of an express trust to perform and comply with the said duties specifically imposed and enjoined by law upon it, constitutes a *constructive fraud* and vitiates the transaction, constituting an abuse of its powers as such trustee, irrespective of whether the lease was or was not the best it could procure." [Clk. Tr. p. 645, lines 18-24.]

Consequently the conclusion by the California Supreme Court that there is no basis for contending the

City did not act fairly because the plaintiff had stipulated there was no actual fraud, is unsupported by the stipulation and is contrary to the findings of fact and the conclusions of law adopted by the trial court. Therefore, petitioner contends that the California Supreme Court acted under a mistake of law in concluding that the petitioner had no basis for contending the City did not act fairly, in this, (1) that petitioner did *not* waive actual fraud; (2) assuming he did waive actual fraud, he did not waive abuse of legislative discretion amounting to constructive fraud. (3) The case was tried on the theory that constructive fraud was an issue in the case. (4) The trial court found there was an abuse of legislative discretion amounting to constructive fraud and further found there was an abuse of the discretion as a trustee of an express trust.

The Supreme Court Erroneously Concluded Petitioner Could Not Rely or Contend That the City Had Acted Unfairly by Reason of the Stipulation That There Was No Actual Fraud.

The Supreme Court acted under a mistake of law in concluding that there was no merit in petitioner's contention that though he stipulated there was no actual fraud, he did not waive the fact that there was "constructive fraud."

The Supreme Court in its decision said.

> "The record contains no evidence of constructive fraud, which fact was recognized by plaintiff in his oral argument since he pointed only to facts which would have constituted actual, and not constructive fraud."

This conclusion has erroneously assumed.

First, that the petitioner had stipulated there was no actual fraud.

Second, that the trial court found there was no proof of constructive fraud.

Third, that the record contains no evidence of constructive fraud.

As stated above, your petitioner did not at any time stipulate there was no actual fraud.

Consequently, petitioner cannot be said to have waived the fact that there was "constructive fraud."

The trial court did, in fact, find that there was proof of constructive fraud and made findings and conclusions of law accordingly as follows:

> "That the failure and omission on the part of said City as said trustee of an express trust to perform and comply with the said duties specifically imposed and enjoined by law upon it constitutes a constructive fraud and vitiates the transaction, constituting an abuse of its powers as such trustee, irrespective of whether the lease was or was not the best it could procure." [Clk. Tr. Vol. III, p. 645.]

The following conclusions of law adopted by the trial court were fully supported by the evidence and established an abuse of legislative discretion amounting to a *"constructive fraud"*. No evidence was offered of "fraudulent intent," and had been withdrawn as an issue in the case.

> "(a) Although said trustee had requested of said committee and a duty was imposed by law to

make a complete investigation and a report as to the facts to said trustee, said committee did not make any investigation or report as to the facts as distinguished from only a recommendation of the subject matter involved, but rather without a full investigation and report of facts, reported only a conclusion, which conclusion was adopted without any investigation by said trustee." [C.R. Tr. p. 646.]

"(b) The trustee, City of Los Angeles, administering its power and authority by its committee, consisting of 14 in number, the majority thereof failed and omitted to exercise their own independent discretion and judgment with reference to the management and leasing of the trust estate." [C.R. Tr. p. 646.]

"(c) The committee did not fully, or at all, inform itself concerning the subject delegated to it, and did not communicate to the trustee, the City Council, all of the material and information received and known, actually and constructively, by it, and did not report the facts and findings in relation to the matter in subject, to-wit, the leasing of the trust estate, but merely gave its own recommendation and without further investigation, that said trustee entered into said lease." [C.R. Tr. p. 646, line 25, to p. 647, line 7.]

"(d) The trustee was charged with notice that said committee had not performed the administrative duties delegated to it." [C.R. Tr. p. 647.]

"(e) The committee made no investigation other than arranged conferences with the applicant whose lease it recommended and did not di-

close to nor advise nor refresh the memories of the remaining members of the city council who constituted the trustee that requests for negotiations for leases had been received from qualified, experienced, and financially responsible applicants but that no negotiations were entered into therewith; that the committee had not followed and was not following the advice of petroleum and geology experts hired by the trustee; that the committee had not made any attempt whatsoever to solicit or procure other applicants for leases; that the committee had not disclosed to other prospective applicants information within the possession, knowledge and control of the committee as to the subject lands, their description and the opinions of experts hired by the trustee as to the probable or possible existence of oil, gas and other hydro-carbon substances therein; that an applicant had filed a petition for deferment of action by the trustee, the City Council, until such applicant could confer with the committe and the trustee; that the committee did not report to the trustee, the City Council, facts, but only a conclusion, to-wit, a recommendation; that the remaining members of the City Council (the City Council as a body being the trustee) made no investigation or were not aware of the facts involved in the transaction." [Clk. Tr. p. 647, line 19, to p. 648, line 12.]

"(f) That although the Trustee, the City Council, as a matter of common prudence had theretofore retained, sought and received the advice of experts pertaining to the management and leasing of the trust estate, it did not, in the matter of the

leasing of the trust estate, confer with or seek the opinion of such experts; it disregarded their prior advice given, and withheld from other highly experienced, capable, financially responsible and desirous lessees, such information in the possession of said trustee procured by it from its said experts as to the potential possibilities of the development of the lands desired to be leased." [Clk. Tr. p. 648, lines 13 to 22.]

"(g) That although requested by other highly experienced, capable, financially responsible and desirous lessees to negotiate with them, the trustee failed and omitted so to do and withheld from such applicants, though requested by them, information in the possession of the trustee as to the potentials of the trust land desired to be leased." [Clk. Tr. Vol. III, p. 648, lines 23 to 28.]

"(h) That though the trustee had expended substantial funds for a determination of the possible potential value of the trust estate and had received written opinions from experts retained by the trustee hypothesizing the possibility of oil and gas existing in the trust property, the trustee, knowing that the applicants had not the opportunity to make an investigation thereof, notwithstanding the said applicants request for information concerning the existence thereof in the possession of the trustee, and notwithstanding that the reports of the said trustee's experts were public records, said trustee withheld from the applicants the information concerning the existence of such reports and incorrectly advised the applicants that

it had no information with reference thereto. That notwithstanding the fact that applications for leasing and request for negotiations for leasing were made to the trustee through the committee by other companies involved in the exploration and development of properties from oil, gas and other hydro-carbon substances, and without a full and complete investigation, the trustee failed and omitted to negotiate with such applicants, disregarded the advice of the experts theretofore retained by the trustee, set no standards as advised by the experts to enable competitive bidding, and without solicitation of any offers upon an equal footing from other experienced, capable and financially responsible applicants within the business field for which trust property was deemed valuable, leased the trust property to a corporation without equipment, organization or capital, but whose organizers were otherwise financially capable though under no legally binding contract so to do to provide such capital." [Clk. Tr. p. 649, line 9.].

"(i) At the time of the adoption of the report of the committee and in resolving upon the execution of the lease to the defendant Harbor Company and the adoption of the ordinance, the members of the committee had stated and represented to the council that the lease to the Harbor Company was the best they could get and the members of the council therefore relied thereon. That said report of the committee was not factual, or correct, or accurate, or the result of any investigation of the subject." [Findings of Fact, p. 643, lines 1 to 8.]

The foregoing findings and conclusions of law were based upon evidence presented *without any proof of actual intent* upon the part of either the committee or any members thereof or of any members of the council to cheat the City of Los Angeles. The following authorities from California and the highest courts of other state jurisdictions establish that the foregoing findings and conclusions of law are a form of constructive fraud. *VonHolt v. Izumo Mission of Hawaii*, 42 Haw. 674; *The Taxpayers League of Wayne County v. Whitman*, 291 N. W. 881.

In *Johnson v. Radio Station WOH*, 13 N. W. 2d 550, 561, the Supreme Court of Nebraska in defining constructive fraud said,

> "'Legal fraud' is synonomous with 'constructive fraud' * * *."

To the same effect is the case of *Cardozo v. Bank of America*, 146 Cal. App. 2d 833 (Supreme Court hearing denied). The Appellate Court in its decision pointed out in that case that there could be no actual fraud "without *intent* to deceive" but nevertheless in that case, the court did find that there was constructive fraud sufficient to have supported a judgment and reversed the judgment. Similarly in that case, the court defined constructive fraud to consist of,

> "Any breach of duty which without an actually fraudulent intent brings an advantage to the person at fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him." The court citing Civil Code Section 1573.

The Supreme Court Acted Under a Mistake of Law in Differentiating Between Actual Fraud and Constructive Fraud as a Basis for Denying Petitioner Capacity to Sue.

The courts of California have consistently held that although a given set of facts may not amount to an actual fraud; a constructive fraud may be found therein and that its legal effect shall be the same.

In the case of *Herd v. Touhy*, 133 Cal. 55, the Supreme Court in commenting on the effect of a constructive fraud stated:

> "This, although not fraud, was one of those cases that, in the words of a leading authority, ought to be treated as fraud,—that is, it is a constructive or quasi fraud, having all the actual consequences and all the legal effects of fraud."

In the later case of *In re Arbuckle's Estate*, 98 Cal. App. 2d 562, it was similarly conceded that there was no actual fraud in the present case. However, the court did find the presence of constructive fraud there and in commenting upon this, stated,

> "In its generic sense, constructive fraud comprises all facts, omissions and concealments involving a breach of legal or equitable duty, trust, or confidence and resulting in damage to another. Constructive fraud exists in cases in which conduct, although not actually fraudulent, ought to be so treated."

Also cited to the same effect is *Exers v. Greenwood*, 139 Cal. App. 2d 345.

The Supreme Court Acted Under a Mistake of Law in Concluding That Petitioner Lacks Capacity to Sue in the Present Action.

The conclusion reached by the Supreme Court that Plaintiff did not have capacity to sue has overlooked the conclusions of law reached by the trial court, to wit:

(a) "That the defendant City of Los Angeles did not, in the management and leasing of said trust estate, to-wit, the submerged lands situate outside the breakwater of outer Los Angeles Harbor, the subject of the lease to Harbor Company, exercise a judgment and care under the circumstances which men of prudence, discretion and intelligence exercise in the management and leasing of their own property, in the exercise of the highest good faith to and for its beneficiary, and said City did not therefore perform a duty imposed and enjoined by law upon it." [Clk. Tr. p. 645, line 25, to p. 646, line 1.]

(b) "Though said trustee had requested of said committee and a duty was imposed upon it by law to make a complete investigation of and a report as to the facts to said trustee, said committee did not make any investigation of or report as to the facts, as distinguished from only a recommendation, of the subject matter involved, but rather without a full investigation and report of facts, reported only a conclusion, which conclusion was adopted without any investigation by said trustee. A trustee has no right or power to delegate its duties as trustee, either to a stranger or to a minority of the persons constituting the trustees." [Conclusions of Law, Clk. Tr. p. 646, lines 6 to 16.]

(e) "The trustee, City of Los Angeles, administering its power and authority by its councilmen, consisting of 14 in number, the majority thereof failed and omitted to exercise their own independent discretion and judgment with reference to the management and leasing of the trust estate. The council of the City of Los Angeles had no legal authority to delegate its powers and duties as trustee of the express trust relating to the said subject lands to a minority thereof, to wit, the committee." [Conclusions of Law, Clk. Tr. p. 640, lines 17 through 25.]

On the basis of the foregoing conclusions of law reached by the trial court, and irrespective of the conclusions reached by the Supreme Court regarding the extent and character of the fraud herein, it is clear that petitioner does have capacity to sue based upon the failure on the part of a governmental body to perform a duty specifically enjoined, and that the Supreme Court acted under a mistake of law in concluding that petitioner lacked capacity to sue.

Where Competition Is Restrained, Any Municipal Contract Awarded Under Such Conditions Is Invalid.

Petitioner contends that in cases where there has been substantial evidence of suppression of competition in the awarding of a municipal contract, as is the case here, the courts of California have consistently held that such facts would vitiate the contract and make it null and void. The Superior Court of California, in reversing the decisions of the courts below declaring the lease in question herein void, has given force and effect to a

situation which the courts have historically provided protection against under its policy of invalidating transactions in which competition is restrained thereby leading to the waste of public funds, to the detriment of the municipal taxpayers.

Morgan v. Gove, 206 Cal. 607;

California v. Reynolds, 123 Cal. 88;

Ertle v. Leary, 114 Cal. 238.

The Acts of a Municipality in Its Capacity as the Trustee of an Express Trust Are Subject to Judicial Review for Acts Tantamount to a Breach of Trust.

When a municipality is acting as the trustee of an express public trust in negotiating an oil and gas lease on a portion of the trust property, the courts of California have always held that municipal action is subject to scrutiny to insure that the conditions and restrictions imposed in dealing with the municipality are reasonable, and consistent with the public policy to prevent favoritism and assure uniform conditions in order to obtain the greatest possible benefit in behalf of all the taxpayers of the municipality.

Holland v. City of San Francisco, 7 Cal. 361;

McKevitt v. City of Sacramento, 55 Cal. App. 117;

2 Scott on Trusts (2nd Ed.), Sec. 174, p. 1295;

Bogert, Trusts and Trustees (2nd Ed.), Sec. 541, pp. 447, 448, 457.

Opinions of the Courts Below.

The decision of the Supreme Court of California, reversing the decisions of the Courts below is hereto attached as Appendix A. The decision of the District Court of Appeal, affirming the ruling of the trial court, may be found in 192 A. C. A. 787, 14 Cal. Rptr. 192.

Summary of Argument.

(1) The procedure and methods used by the City Council of the defendant City of Los Angeles in granting said lease to the defendant development company was a violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States causing a breach of the public trust and leading to the potential injury to the Municipal taxpayers.

(2) The decision of the Supreme Court of California in granting said lease to the defendant development company, if allowed to stand, would condone a violation of the rights guaranteed under the Fourteenth Amendment of the Constitution of the United States resulting in ultimate injury to the taxpayers.

Conclusion.

Your petitioner respectfully submits that the *Writ of Certiorari* should issue to the end that this Court may review the decision of the Supreme Court of the State of California and determine whether the Defendant City of Los Angeles has denied any rights guaranteed by the Fourteenth Amendment of the Federal Constitution, and whether this denial has been erroneously approved by the Supreme Court of California.

Respectfully submitted,

PHILIP SILVER,

Plaintiff in Pro. Per.

APPENDIX A.

Opinion of Supreme Court of California.

[L. A. No. 25816. In Bank. Nov. 30, 1961.]

Phill Silver, as a Taxpayer, etc., Plaintiff and Respondent, v. The City of Los Angeles et al., Defendants and Appellants.

[On hearing after decision by the District Court of Appeal, Second Appellate District, Division Two, Civ. No. 24601 (192 A.C.A. 787, 14 Cal.Rptr. 192) affirming judgment of the superior court. Judgment reversed.]

Appeals from a judgment of the Superior Court of Los Angeles County. Alfred Gitelson, Judge. Reversed.

Action by a taxpayer of a charter city to have declared void and to set aside an oil and gas lease to tidelands which the city held as trustee. Judgment for plaintiff reversed.

Roger Arnebergh, City Attorney, Bourke Jones, Assistant City Attorney, Spencer L. Halverson, Deputy City Attorney, Young & Prenner, James J. Ardito, Ronald H. Prenner, Claude E. Young, Melvin L. Pierovich, Ball, Hunt & Hart and Joseph A. Ball for Defendants and Appellants.

Phill Silver, in pro. per., for Plaintiff and Respondent.

Stanley Mosk, Attorney General, Jay E. Shavelson and N. Gregory Taylor, Deputy Attorneys General, as Amici Curiae on behalf of Plaintiff and Respondent.

McComb, J.—Defendants appeal from a judgment in favor of plaintiff after trial before the court in an action brought by plaintiff as a taxpayer to have declared void, and to set aside, an oil and gas lease be-

tween defendant City of Los Angeles, as lessor, and defendant Los Angeles Harbor Oil Development Co., as lessee, covering approximately 6,400 acres of submerged lands in the Los Angeles Outer Harbor.

This is the sole question necessary for us to determine: *May a taxpayer bring a representative action to set aside a contract entered into between a municipality and a private corporation relative to lands held by the municipality in trust, in the absence of fraud, collusion, ultra vires, or a failure on the part of the municipality to perform a duty specifically enjoined?*

A taxpayer in his representative capacity can sue a municipality only in cases involving fraud, collusion, ultra vires, or a failure on the part of the governmental body to perform a duty specifically enjoined. (*Nickerson v. County of San Bernardino*, 179 Cal. 518, 522 [177 P. 405]; *Dunn v. Long Beach L. & W. Co.*, 114 Cal. 605, 609 [46 P. 607]; *Pratt v. Security Trust & Savings Bank*, 15 Cal.App.2d 630, 636 [1] et seq. [59 P.2d 862]; 18 McQuillin, Municipal Corporations (3d ed. 1950) § 52.07, p. 23; *cf.* 124 A.L.R. (1940) pp. 1238-1240.)

In the instant case it was stipulated by the parties at the beginning of the trial that there was no actual fraud, corruption, bad faith, or undue influence involved in the granting of the lease by defendant municipality to defendant development company. Ultra vires was not pleaded, nor was any evidence thereof presented during the trial.

Plaintiff contends that defendant municipality was bound by section 2261 of the Civil Code and the common law of trusts to administer the trust property with the care and skill which a man of ordinary prudence would exercise in dealing with his own property; that defendant councilmen, acting on behalf of defendant municipality, did not exercise such degree of care and skill in the negotiations for the lease; and that their failure to do so constituted a failure by said defendant to perform a duty specifically enjoined.

Although the proper use of the tidelands and tideland revenue is a statewide affair (*People v. City of Long Beach*, 51 Cal.2d 875, 883 [5] [338 P.2d 177]; *Mallon v. City of Long Beach*, 44 Cal.2d 199, 209 [9] [282 P.2d 481]; *City of Long Beach v. Morse*, 31 Cal.2d 254, 264 et seq. [188 P.2d 17]), this does not mean that the administration of the trust is in all matters a statewide affair. (*Cf. Douglas v. City of Los Angeles*, 5 Cal.2d 423, 428 [2] [53 P.2d 353]; *Helbach v. City of Long Beach*, 50 Cal.App.2d 242, 246 [3] [123 P.2d 62].)

Defendant municipality is a charter city, and until the Legislature acts to provide otherwise, the manner in which it effectuates the purposes of the tidelands trust, including the manner in which it conducts negotiations for the leasing of the lands, is a municipal affair. (6 Cal. Const., art. XI, §§ 6, 8; *cf. Dynamic Industries Co. v. City of Long Beach*, 159 Cal.App.2d 294, 299 [5] [323 P.2d 708] [hearing denied by the Supreme Court].)

At the time the lease was executed (December 28, 1956) and ratified (January 14, 1957), there was no relevant charter or statutory provision directing the manner in which the lands were to be leased.*

All that was required of defendant municipality was that its agents act fairly in all matters respecting the proper discharge of their duties. (*West etc. Ins. Co. v. Glenn etc. Irr. Dist.*, 50 Cal.App.2d 204, 209 [2] [122 P.2d 595].) Since it was stipulated that there was no actual fraud, corruption, bad faith, or undue influence, there is no basis for contending that they did not act fairly.

On the contrary, in view of the stipulation it must be found that defendant councilmen applied their honest, considered judgment to the problem at hand. Under such circumstances, they are answerable to the electorate, but not the courts, if they were mistaken or were wanting in business acumen. (*West etc. Ins. Co. v. Glenn etc. Irr. Dist., supra*, at 209, 211.)

There is no merit in plaintiff's contention that though he stipulated there was no "actual fraud," he did not waive the fact that there was "constructive fraud," be-

*In 1959 the Legislature enacted specific legislation governing the procedures by which oil and gas leases are to be granted by municipalities. It requires advance publication of a resolution which specifies the minimum royalty, the term of the lease, its form, and one variable bidable factor on which sealed bids are to be received. The lease must go to the highest responsible bidder. This legislation applies to cities operating under the general laws with respect to all oil and gas leases, and to charter cities only with respect to tide and submerged lands granted in trust to them by the state. (Pub. Resources Code, §§7058.5, 7059, 7060, 7061.)

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 30 1962

IN THE

Supreme Court of the United States

October Term, 1961

No. 948

Paul Kerr, as taxpayer of the City of Los Angeles and on behalf of all other taxpayers of the City of Los Angeles,

Plaintiff and Petitioner,

vs.

The City of Los Angeles, a municipal corporation, Los Angeles Harbor Oil Development Company, [illegible],

Defendants and Respondents.

Letter of Respondent Los Angeles Harbor Oil Development Co. in Opposition to Petition for Writ of Certiorari

Young & Peterson,
333 West Ninth Street,
Los Angeles 15, California,
James J. Adderio,
Maurice L. Pollevoise,
707 West Seventh Street,
Los Angeles 17, California,
Ball, Hunt & Hart,
James A. Ball,
Clyde Hamerstrom,
120 Linden Avenue,
Long Beach 2, California,

Attorneys for Respondent Los Angeles Harbor Oil Development Co.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

1. Summary of proceedings in the California trial court 2
   First cause of action 3
   Second cause of action 3
   Third cause of action 3
   Fourth cause of action 3
   Fifth cause of action 3
2. Summary of proceedings in the California Supreme Court 4
3. There are no federal rights or questions involved in the proceedings 6
4. Conclusion 12

TABLE OF AUTHORITIES CITED

CASES.	PAGE
Abbott v. National Bank of Commerce, 20 S. Ct. 153, 175 U. S. 409, 44 L. Ed. 217	9
Aero Mayflower Transit Co. v. Bd. of R R. Comm., 68 S. Ct. 167, 332 U. S. 495, 92 L. Ed. 99	9
California State Auto Assn. Bureau v. Maloney, 71 S. Ct. 601, 341 U. S. 105, 95 L. Ed. 788	8
Central Land Co. v. Laidley, 159 U. S. 103, 16 S. Ct. 80, 40 L. Ed. 91	7
Commercial Bank of Cincinnati v. Buckingham, 5 How. 317, 12 L. Ed. 169	8
Congdon, etc., Mining Co. v. Goodman, 2 Black 574, 17 L. Ed. 257	8
Davis v. Santa Ana, 108 Cal. App. 2d 669, 239 P. 2d 656	7
Dunn v. Long Beach Land & Water Co., 114 Cal. 605, 46 Pac. 607	8
Ferry v. King County, 12 S. Ct. 128, 141 U. S. 668, 35 L. Ed. 895	8
General Trading Co. v. State Tax Court, 64 S. Ct. 1028, 88 L. Ed. 1309, 322 U. S. 335	11
Grand Gulf, Railroad, etc., Co. v. Marshall, 12 How. 165, 13 L. Ed. 938	8
Knox v. Exchange Bank, 12 Wall. 379, 20 L. Ed. 414	7
Liberty Warehouse Co. v. Burley Cooperative Assn., 48 S. Ct. 291, 276 U. S. 71, 72 L. Ed. 473	7, 11
Lessieur v. Price, 12 How. 59, 13 L. Ed. 893	8
Nickerson v. San Bernardino, 179 Cal. 518, 177 Pac. 465	8
Pratt v. Security Trust, 15 Cal. App. 2d 630, 59 P. 2d 862	8
Quong Ham Wah Co. v. I. A. C., 255 U. S. 413, 65 L. Ed. 723	8

PAGE

Scott v. Jones, 5 How. 343, 12 L. Ed. 181 8

Sevier v. Haskell, 14 Wall. 12, 20 L. Ed. 827 7

Silver v. City of Los Angeles, et al., 57 A. C. 13 4

Smith v. Hunter, 7 How. 738, 12 L. Ed. 894 8

Snell v. Chicago, 14 S. Ct. 489, 152 U. S. 191, 38 L. Ed. 408 8

Snowden v. Hughes, 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497 7

U. S. Fidelity & Guaranty Company v. Oklahoma, 63 L. Ed. 876, 230 U. S. 111, 39 S. Ct. 399 7

West Ins. Co. v. Glenn Irr. Dist., 50 Cal. App. 2d 304, 122 P. 2d 595 8

STATUTES

California Statutes of 1911, p. 1250 2

Los Angeles City Charter, Sec. 40 3

Submerged Lands Act, Sec. 3 2

United States Code Annotated, Title 28, p. 1257 2

United States Code Annotated, Title 43, p. 1311 2

United States Constitution, Fourteenth Amendment 6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 848

PHILL SILVER, as a taxpayer of the City of Los Angeles and on behalf of all other taxpayers of the City of Los Angeles,

Plaintiff and Petitioner,

vs.

THE CITY OF LOS ANGELES, a municipal corporation, LOS ANGELES HARBOR OIL DEVELOPMENT COMPANY, *et al.*,

Defendants and Respondents.

Answer of Respondent Los Angeles Harbor Oil Development Co. to Petition for Writ of Certiorari.

This is a representative taxpayer's suit brought by petitioner in the California state courts to set aside an oil and gas lease granted by respondent City of Los Angeles to respondent Los Angeles Harbor Oil Development Company. In a decision filed on November 30, 1961, the California Supreme Court held that petitioner could not maintain the action unless there was fraud, collusion, *ultra vires*, or failure of the City to perform a specific duty in the granting of the lease. Finding that none of these elements had

been established, the Supreme Court reversed a lower court judgment which had invalidated the lease. Petitioner now seeks certiorari to review the judgment of the California Supreme Court.

The Petition for Writ of Certiorari should be denied forthwith. It is sham and frivolous. It states no grounds for certiorari. The judgment of the California Supreme Court is based solely upon state law. As no federal questions are presented, the United States Supreme Court has no jurisdiction to review the proceedings (28 U. S. C. A. 1257). Respondent requests a prompt denial of the petition, as its pendency is delaying the drilling of wells under the lease.

1. Summary of Proceedings in the California Trial Court.

For many years prior to 1956, the City of Los Angeles had been attempting to interest oil companies in leasing submerged lands located in the Los Angeles Harbor. The City had acquired title to the lands in 1911 under a tideland grant from the State of California (Statutes of 1911, Page 1256). In 1953, the federal government had quitclaimed its interest in the lands by virtue of Section 3 of the Submerged Lands Act (43 U. S. C. A. 1311).

No person or firm had ever made an offer to lease the lands until respondent Los Angeles Harbor Oil Development Company made an offer in August 1956. The proposal was widely publicized in magazines and newspapers throughout the area. The offer was accepted in December 1956 and an oil and gas lease was granted to the Development Company.

After the lease was awarded, petitioner, as a taxpayer of the City of Los Angeles, filed this action to set aside the lease. Named as defendants were the City of Los Angeles and the Development Company. An attempt by petitioner to bring the Attorney General of California into the case was refused. The five causes of action in the amended complaint alleged a variety of theories to invalidate the lease:

First Cause of Action.

The City abused its discretion in approving a council committee report which recommended that the lease be awarded to the Development Company, without giving other oil companies an opportunity to submit proposals.

Second Cause of Action.

The Mayor violated Section 40 of the Los Angeles City Charter in failing to exercise "constant supervision" over the granting of the lease.

Third Cause of Action.

In restricting lease proposals to the Development Company, the Los Angeles City Council "contravened" the California Constitution and the equal protection clause of the Fourteenth Amendment.

Fourth Cause of Action.

The City breached its trust and failed to exercise ordinary care by not giving other oil companies an opportunity to submit lease proposals.

Fifth Cause of Action.

In awarding the lease to the Development Company, the City violated the Public Resources Code of the State of California.

After a lengthy trial, the trial court concluded that the lease was invalid for two reasons: (a) the City had failed to exercise *due care* in awarding the lease, and (b) the City had *improperly delegated* consideration of the lease to a *committee* of the City Council [Clk. Tr. pp. 321, 605]. A judgment declaring the lease void was entered. As to all other allegations in the amended complaint, the court found against petitioner. It is to be noted that only the third cause of action purported to raise any federal or constitutional question. With respect to this cause of action, the trial court found that the City did not violate any of petitioner's rights under the Fourteenth Amendment (Pet. p. 11).

2. Summary of Proceedings in the California Supreme Court.

After the adverse judgment in favor of petitioner, respondents City of Los Angeles and the Development Company appealed to the California Supreme Court. In a unanimous decision filed on November 30, 1961, the California Supreme Court reversed the judgment which had invalidated the lease (*Silver, v. City of Los Angeles, et al.*, 57 A. C. 13). The decision was based solely upon California law. At the beginning of its opinion, the court stated, in no uncertain terms, the sole question for decision:

> "This is the sole question necessary for us to determine: *May a taxpayer bring a representative action to set aside a contract entered into between a municipality and a private corporation relative to lands held by the municipality in trust, in the absence of fraud, collusion, ultra vires, or a failure*

on the part of the municipality to perform a duty specifically enjoined." (Opinion of California Supreme Court: Petition for Writ, Appendix A, p. 2).

The court held that a taxpayer in California can maintain a representative action to set aside a municipal contract only in the event of fraud, collusion, *ultra vires*, or failure on the part of the City to perform a specifically enjoined duty. Pointing to petitioner's stipulation that there was no actual fraud, corruption, bad faith or undue influence involved in the granting of the lease, the court reversed the judgment:

> "All that was required of defendant municipality was that its agents act fairly in all matters respecting the proper discharge of their duties. . . . Since it was stipulated that there was no actual fraud, corruption, bad faith, or undue influence, there is no basis for contending that they did not act fairly.
>
> "On the contrary, in view of the stipulation it must be found that defendant councilmen applied their honest, considered judgment to the problem at hand. Under such circumstances, they are answerable to the electorate, but not the courts, if they were mistaken or were wanting in business acumen. . . .
>
> * * * * *
>
> "'Applying the above-stated rules of law to the undisputed factual situation in the present case, plaintiff as a taxpayer in his representative capacity cannot maintain the present action." (Petition for Writ, Appendix A, pp. 4, 5).

The court did not mention petitioner's contention that the awarding of the lease "contravened" the equal protection clause of the Fourteenth Amendment.

3. There Are No Federal Rights or Questions Involved in the Proceedings.

In petitioner's own words, the questions presented by the petition are (1) did the City of Los Angeles "violate" the equal protection clause of the Fourteenth Amendment, and (2) whether the decision of the California Supreme Court "would be contrary to" the Fourteenth Amendment (Petition for Writ, p. 12).

It is to be noted that petitioner does not raise a question as to violation of any of *his* federal rights. The reason is that none of petitioner's constitutional rights were involved in the granting of the lease. Petitioner was not a prospective bidder for the lease. He does not claim that he was denied an opportunity to submit a bid. He does not allege that he had any interest in the lands. He does not allege that his taxes were increased as a result of the granting of the lease. The petitioner states no grounds for certiorari, as none of his rights under the Fourteenth Amendment are involved. Petitioner is a mere taxpayer who claims that the City should not have granted a lease to the Development Company.* The allegation of a fictitious

*Petitioner's real contention throughout the litigation has been that the City might have obtained a lease on better terms. But the trial court did not so find. [Clk. Tr. p. 605.] The evidence at the trial disclosed that, before the lease was awarded to the Development Company, the Union Oil Company and General Petroleum Company had expressed an interest in the lands to be leased. But neither company made any kind of an offer to the City. A representative of General Petroleum testified at the trial that his company would *not* have signed the lease granted to the Development Company. Although repeatedly warned by the trial judge to call an officer of the Union Oil Company to explain whether his company would have offered better terms, petitioner failed to do so. His failure resulted in a presumption under California procedural law that the Union Oil Company would not have offered a better lease (California Code of Civil Procedure, Section 1963, Subdivision 5).

constitutional question is insufficient. There must be a real, constitutional right of the petitioner which is asserted (*U. S. Fidelity & Guaranty Company v. Oklahoma*, 63 L. Ed. 870, 250 U. S. 111, 39 S. Ct. 399).

Petitioner cannot assert any rights of the General Petroleum or the Union Oil Companies. In *Liberty Warehouse Co. v. Burley Cooperative Assn.*, 48 S. Ct. 291, 276 U. S. 71, 72 L. Ed. 473, this court held that a petitioner ". . . must show that enforcement of the challenged judgment would deprive it—not another—of some right arising under the Constitution or laws of the United States. . . ."

We do not concede that the General Petroleum and the Union Oil Companies had any constitutional rights which were either involved or violated. Under the local law in effect when the lease was granted, the City was not required to submit the lease to competitive bidding (Petition for Writ, Appendix A, p. 4). In *Davis v. Santa Ana*, 108 Cal. App. 2d 669, 239 P. 2d 650, it was held that "in the absence of some specific charter or statutory requirement, municipal contracts need not be let under competitive bidding". Even if the General Petroleum and Union Oil Companies had asserted any rights, the equal protection clause would not have required the City to have awaited their bids before awarding a lease (*Snowden v. Hughes*, 321 U. S. 1, 64 S. Ct. 397, 88 L. Ed. 497). This court has never intimated that the Fourteenth Amendment requires competitive bidding of municipal contracts. (See: *Seeley v. Haskell*, 14 Wall. 12, 20 L. Ed. 827; *Knox v. Exchange Bank*, 12 Wall. 379, 20 L. Ed. 414; *Central Land Co. v. Laidley*, 159 U. S. 103, 16 S. Ct. 80, 40 L. Ed. 91; *California State Auto. Assn.*

Bureau v. Maloney, 71 S. Ct. 601, 341 U. S. 105, 95 L. Ed. 788).

Petitioner's real argument appears to be that the California Supreme Court did not follow California law. It is alleged that the California Supreme Court "acted under a mistake of law" in concluding that he did not have the capacity to bring the action (Petition for Writ, p. 13). Petitioner relies entirely upon California state court decisions involving taxpayers' suits which attack a public contract (Petition for Writ, p. 14). But he has erroneously interpreted the California decisions which have consistently held that fraud, *ultra vires*, collusion, or failure to comply with a specific duty are necessary elements of a taxpayer's suit (*West Ins. Co. v. Glenn Irr. Dist.*, 50 Cal. App. 2d 204, 122 P. 2d 595; *Nickerson v. San Bernardino*, 179 Cal. 518, 177 Pac. 465; *Dunn v. Long Beach Land & Water Co.*, 114 Cal. 605, 46 Pac. 607; *Pratt v. Security Trust*, 15 Cal. App. 2d 630, 59 P. 2d 862). Even if petitioner were correct and the California Supreme Court had either misconstrued or had changed the local law applicable to such suits, certiorari is not available (*Commercial Bank of Cincinnati v. Buckingham*, 1847, 5 How. 317, 12 L. Ed. 169; *Congdon, etc. Mining Co. v. Goodman*, 1862, 2 Black 574, 17 L. Ed. 257; *Lessieur v. Price*, 1851, 12 How. 59, 13 L. Ed. 893; *Smith v. Hunter*, 1849, 7 How. 738, 12 L. Ed. 894; *Scott v. Jones*, 1847, 5 How. 343, 12 L. Ed. 181; *Grand Gulf Railroad, etc. Co. v. Marshall*, 1851, 12 How. 165, 13 L. Ed. 938; *Snell v. Chicago*, 1894, 14 S. Ct. 489, 152 U. S. 191, 38 L. Ed. 408; *Ferry v. King County*, 1891, 12 S. Ct. 128, 141 U. S. 668, 35 L. Ed. 895; *Quong Ham Wah Co. v. I. A. C.*, 1921, 255 U. S. 443, 65 L. Ed. 723; *Aero Mayflower Transit Co. v. Bd. of*

R.R. Comm., 1947, 68 S. Ct. 107, 332 U. S. 495, 92 L. Ed. 99).

In *Abbott v. National Bank of Commerce*, 1899, 20 S. Ct. 153, 175 U. S. 409, 44 L. Ed. 217, this court pointed out its lack of jurisdiction to review state court decisions on private civil matters:

> "If it erred in so declaring, it was an error as to a matter of general law and involved no question of a federal nature; still less an error which in any legal sense deprived the plaintiff of his reputation. . . . There was, in our opinion, color for the motion to dismiss, and therefore the motion to affirm may be considered; and as the judgment below did not deprive plaintiff of any right, privilege or immunity secured by the Constitution or laws of the United States, it is affirmed. . . ."

The same answer applies to the argument that the California Supreme Court erroneously interpreted petitioner's stipulation. It is contended that petitioner did not stipulate that there was no fraud in the granting of the lease (Petition for Writ, p. 18). He quotes a portion of the proceedings which occurred during the trial. But petitioner overlooks the stipulation that he made in oral argument on October 17, 1961 before the California Supreme Court:

> "Mr. Silver: . . .
>
> I have not waived fraud entirely. I have submitted my case on the theory, below, that there was a constructive fraud in the method and manner in which this lease was negotiated, to the detriment of other bona fide persons who were seeking likewise to negotiate a lease with the City.

The Chief Justice: You stipulated that there was no actual fraud.

Mr. Silver: *No actual fraud.*

The Chief Justice: Are you saying now that you are basing your contention upon a claim that there was constructive fraud?

Mr. Silver: There was constructive fraud.

Now, your Honors please, we are dealing, first of all—and this should also be considered in its proper setting—with a piece of land that may potentially be worth to the City of Los Angeles many millions of dollars, if not hundreds of millions of dollars. The two reports of the experts which I—

The Chief Justice: That isn't our problem. Let's stay with our difficult problem. Those things are all matters of color, we understand that, but our problem now is to find constructive fraud, or—

Mr. Silver: All right.

The Chief Justice:—the specific duty that is enjoined that has been violated.

Mr. Silver: All right.

Public officials, such as a City Council, have a duty to perform in connection with the administration of the property of the municipality, either in its sale or in the leasing thereof. They can't give it away, they can't act collusively to befriend people, and they can't act corruptly to share in the profits with the beneficiaries of the sale or the lease. Our courts have always had that power to—

The Chief Justice: *You have eliminated those grounds.*

Mr. Silver: *Yes.*

The Chief Justice: I will go over this once again with you.

As I understand it, you are limited now to one of two things: constructive fraud or the violation of a duty specifically enjoined. Let's stay with them.

Mr. Silver: I'm trying.

The Chief Justice: *We are not entirely ignorant of the law with respect to corruption and matters of that sort; but you have eliminated them, so let's not talk about them."* [Reporter's Transcript of Oral Argument in the California Supreme Court, pp. 19-21.] (Emphasis ours.)

As disclosed by these proceedings, petitioner *did* stipulate that there was *no* fraud in the granting of the lease. The extent and scope of the stipulation and its effect upon the action is a local, not a federal, question. In *General Trading Co. v. State Tax Court*, 1944, 64 S. Ct. 1028, 88 L. Ed. 1309, 322 U. S. 335, this court stated that "The application . . . of local laws and the facts on which it founded its judgment are of course controlling". In *Liberty Warehouse Co. v. Burley Cooperative Assn., supra*, 48 S. Ct. 291, 276 U. S. 71, 72 L. Ed. 473, the court stated that "No federal right was impaired by striking No. 3 from the amended answer and counterclaim. Proceedings in state courts must conform to the reasonable requirement of local law. Whether they do is primarily for those courts to determine. . . "

4. Conclusion.

The petition is a sham and frivolous. It offers no color of a federal or constitutional question.

After many years of attempting to interest oil companies, the respondent City of Los Angeles finally secured a lessee willing to drill wildcat wells upon its lands. Instead of serving the interests of taxpayers and residents of the City of Los Angeles, petitioner has done them a real disservice. He has delayed the drilling of wells and the development of the lands for more than five years. Further delay should be avoided. The petition should be promptly denied.

Respectfully submitted,

YOUNG & PRENNER,
JAMES J. ARDITTO,
MELVIN L. PIEROVICH,
BALL, HUNT & HART,
JOSEPH A. BALL,
CLARK HEGGENESS,

Attorneys for Respondent Los Angeles Harbor Oil Development Co.

SUBJECT INDEX

PAGE

Statement of the case 1

I.

There is no federal question involved 2

II.

Petitioner is not one of the class claimed to be discriminated against 3

III.

Cases cited by petitioner respecting jurisdiction of this court are not applicable to the facts in the case at bar 4

Conclusion 4

TABLE OF AUTHORITIES CITED

Cases	Page
Cochran v. Kansas, 316 U. S. 255	4
Fowler v. Rhode Island, 345 U. S. 67	4
Huddleston v. Dwyer, 322 U. S. 232	2
Iowa Des Moines Bank v. Bennett, 284 U. S. 239	4
Kizer v. Texarkana etc. R. Co., 179 U. S. 199	4
Liberty Warehouse Co. v. Burley Cooperative Assn., 276 U. S. 71	3
Missouri v. Canada, 305 U. S. 337	4
Neblett v. Carpenter, 305 U. S. 297	2, 3
Niemotko v. Maryland, 340 U. S. 268	4
Silver, Phill, etc. v. City of Los Angeles, et al., 57 A.C. 13	3
Virginia, Ex parte, 100 U. S. 339	4

Statutes	
United States Code Annotated, Title 28, Sec. 1257(3)	3
United States Constitution, Fourteenth Amendment	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

PHILL SILVER, as a taxpayer of the City of Los Angeles, and on behalf of all other taxpayers of the City of Los Angeles,

Plaintiff and Petitioner;

vs.

THE CITY OF LOS ANGELES, a municipal corporation, LOS ANGELES HARBOR OIL DEVELOPMENT COMPANY, *et al.*,

Defendants and Respondents.

Answer of Respondent the City of Los Angeles to Petition for Writ of Certiorari.

Statement of the Case.

Respondent, City of Los Angeles, pursuant to unanimous approval of its City Council, granted an oil and gas lease to Respondent, Los Angeles Harbor Oil Development Company, without advertising for bids. Neither the City Charter nor the laws of the State of California require such advertising.

Petitioner, as a taxpayer, filed a representative taxpayers' suit to set aside said lease on the grounds that

such action on the part of the City was a manifest abuse of discretion; that the mayor abused his executive discretion in signing the lease; that a better lease could have been obtained if bids had been requested, and by not so doing the Respondent City "contravened the equal protection clause of the Fourteenth Amendment"; that, the City in granting the lease committed an abuse of the discretion imposed upon a trustee, and that the lease is void because certain procedures of the Public Resources Code of the State of California were not followed.

The Supreme Court of the State of California reversed a lower court judgment which had held the lease invalid and Petitioner now seeks to review the decision of said Supreme Court.

I.

There Is No Federal Question Involved.

The decision of the Supreme Court of the State of California is based solely on state law, *i.e.*, the capacity of a taxpayer to bring a representative action to set aside a contract entered into between a municipality and a private corporation relative to lands held by a municipality in trust, in the absence of fraud, collusion, *ultra vires*, or a failure on the part of the municipality to perform a duty specifically enjoined.

This matter is of state concern only and does not involve the federal constitution in any way.

Decisions of the highest court of the state on matters of state law are generally conclusive upon the Supreme Court of the United States.

Huddleston v. Dwyer, 322 U. S. 232, 236;

Nehlett v. Carpenter, 305 U. S. 297, 302.

It is submitted that the decision of the Supreme Court of the State of California in Phill Silver, etc., v. City of Los Angeles, et al., 57 A. C. 13, is controlling upon this Court as to all matters passed upon therein.

Neblett v. Carpenter, supra.

As no federal questions are presented, the court has no jurisdiction to review the proceeding.

28 U. S. C. A. 1257(3).

II.

Petitioner Is Not One of the Class Claimed to Be Discriminated Against.

Nowhere in Petitioner's Brief does he show facts wherein he was denied equal protection of the laws or wherein there was any discrimination against him or members of the class which he claims to represent; he makes only unsupported statements that if the decision of the Supreme Court of California is allowed to stand it would be contrary to the Fourteenth Amendment (Petitioner's Br. p. 9) and that the procedures and methods used by the Respondent City in granting the lease were a violation of the equal protection clause of the Fourteenth Amendment (Petitioner's Br. p. 34).

Petitioner does not allege that any of his rights have been violated; and one who is not within the class claimed to be discriminated against can not raise such a constitutional question.

Liberty Warehouse Co. v. Burley Cooperative Assn. 276 U. S. 71, 88.

The title, right, privilege or immunity claimed by petitioner to have been discriminated must have been adverse to *him.*

Kizer v. Texarkana etc. R. Co., 179 U. S. 199.

III.

Cases Cited by Petitioner Respecting Jurisdiction of This Court Are Not Applicable to the Facts in the Case at Bar.

Petitioner states that the cases of

Fowler v. Rhode Island, 345 U. S. 67;

Niemotko v. Maryland, 340 U. S. 268, 272-273;

Ex parte Virginia, 100 U. S. 339;

Cochran v. Kansas, 316 U. S. 255 (improperly cited as p. 250);

Iowa Des Moines Bank v. Bennett, 284 U. S. 239;

Missouri v. Canada, 305 U. S. 337.

sustain the jurisdiction of this court to review the decision of the Supreme Court of California.

An examination of said cases discloses that the facts involved therein do not involve any principle remotely similar to the principle underlying the case at bar and have absolutely no application.

Conclusion.

By reason of the fact that the records show that there is no substantial federal question involved and that all of the issues decided herein are purely matters which

were properly decided by the Supreme Court of the State of California it is submitted that the petition in this case should be denied.

Respectfully submitted.

ROGER ARNEBERGH,
City Attorney,

BOURKE JONES,
Assistant City Attorney,

SPENCER L. HALVERSON,
Division Chief,
Deputy City Attorney,

Attorneys for Respondent the City of Los Angeles.